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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES SAMUELL,

Defendant and Appellant.

2d Crim. No. B284114
(Consolidated with B287142)
(Super. Ct. No. LA084384)
(Los Angeles County)

Appellant James Samuell was convicted of first degree residential burglary. (Pen. Code, §§ 459, 460.) He was sentenced to prison for two years.

In these consolidated appeals from the judgment and a postjudgment victim restitution order, appellant contends that (1) the evidence is insufficient to show that he intended to commit theft when he entered the residence, (2) the trial court erroneously admitted evidence of a prior uncharged attempted break-in of another residence, (3) the trial court improperly questioned the jurors during its investigation of the foreperson's complaint that a juror had refused to follow the instructions, (4)

he was denied effective assistance of counsel because his counsel failed to object to the court's questioning of the jurors, (5) the trial court abused its discretion in denying his motion to continue the restitution hearing, and (6) he is entitled to have the case remanded to the trial court for the purpose of determining his ability to pay assessments and a fine imposed at the time of sentencing. We affirm.

Facts

People's Evidence

In 2016 Na'Chelle Catron was renting an apartment at a North Hollywood residence owned by Romualda Ayon, appellant's mother. The apartment was one of two rental units behind the main house. In August 2016 Catron received a notice from the City of Los Angeles (City). City said that a single family dwelling at Catron's address had been illegally converted to a duplex without permits or approvals. It ordered Ayon to "[d]iscontinue the unapproved occupancy." City noted, "Relocation assistance may be required if a tenant is evicted in order to comply with [this] order."

Catron requested that Ayon return her security deposit and pay relocation assistance. Ayon refused and demanded that Catron "leave immediately." Ayon threatened that, if she did not leave, her "'stuff will be gone.'" Ayon said, "'I know when you leave, and if you don't leave, I'll make you leave.'" Catron responded that she would vacate the premises "as soon as [Ayon] gives me my deposit and my relocation fees." Catron testified that Ayon made statements "threatening my job, threatening my items in my apartment, threatening to break in, threatening to lock me out."

Catron installed a "wi-fi security camera" inside the apartment. On September 22, 2016, she left the apartment to go to school. She locked the doors and windows. The following day, while Catron was still away, appellant and two women broke into the apartment. The security camera sent a live video of the break-in to Catron's cell phone. Catron saw appellant and two women "entering the apartment, exiting the apartment, holding objects in their arms, laughing, joking, wearing some of my clothing." She called 911.

When Catron returned to the apartment, some of her property was missing. The missing property included her laptop, camera lens, training equipment, shoes, shorts, and all of the beer in the refrigerator. While she was watching the live video of the break-in, she saw an "individual open up the refrigerator, take out a couple beers, pop one open and continue to drink the beer while they were inside my apartment."

The People presented evidence of a prior uncharged attempted break-in committed by appellant at another rental unit next to the unit where Catron lived. The other unit, which was then occupied by Rachel Bachakes, was also owned by appellant's mother. One morning at about 5:00 a.m., Bachakes was awakened by the front "door shaking." The door was locked, and "somebody [was] trying to open" it. Bachakes looked out the window and saw appellant walking away from the unit.

Bachakes did not remember the date of the incident, but it was probably "late in 2015." She moved out of the rental unit in February 2016, approximately seven months before the break-in of Catron's rental unit. Bachakes did not have a dispute with appellant, but she had a dispute with his mother about the rental unit. Before the incident, she had obtained a restraining order

against mother. Bachakes said that mother had been "physical with me."

Appellant's Evidence

Appellant testified as follows: He went to his mother's property "on a daily basis." The last time he saw Catron there was "a month and a half or more" before he entered her rental unit. His mother told him that she believed Catron had "abandoned the property." Mother "wanted [appellant] to pack up [Catron's] stuff and start boxing everything up." She said "that we're going to need to clear out the room." Because mother did not have a key, appellant forced open the locked front door. He entered the premises along with his girlfriend and another woman. He denied that anyone had taken Catron's property: "I had my eyes on everyone, and no one could have possibly passed by me without me seeing anything."

As to the Bachakes incident, appellant testified, "I don't recall trying to open her door at 5:00 in the morning" or at any "other time."

Sufficiency of the Evidence

"[T]he substantive crime of burglary is defined by its elements as: (1) entry into a structure, (2) with the intent to commit theft or any felony. [Citations.]" (*People v. Anderson* (2009) 47 Cal.4th 92, 101.) Appellant claims that the evidence is insufficient to show that he entered Catron's rental unit with the intent to commit theft. "When a defendant challenges the sufficiency of the evidence, "'[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt." [Citation.]' [Citations.] 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence. [Citation.]' [Citation.] We ""presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

Substantial evidence supports the jury's finding that appellant entered the rental unit with the intent to commit theft. The jury could have reasonably inferred that appellant was acting in concert with his mother, who had threatened Catron that her "'stuff will be gone'" if she did not leave. After the break-in, some of Catron's property was missing. "[T]he existence of the requisite intent [for burglary] is rarely shown by direct proof, but may be inferred from facts and circumstances. [Citation.] Evidence of theft of property following entry may create a reasonable inference that the intent to steal existed at the moment of entry. [Citation.]" (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 541; see also *In re Leanna W.* (2004) 120 Cal.App.4th 735, 741 ["evidence such as theft of property from a dwelling may create a reasonable inference that there was intent to commit theft at the time of entry"].)

Evidence of Appellant's Prior Uncharged Attempted Break-in of Bachakes's Rental Unit

In deciding to admit evidence of appellant's prior uncharged acts at Bachakes's rental unit, the trial court reasoned, "[I]f there's evidence that he tried to break into [Bachakes's] door while she was sleeping at some point relatively close in time to when the charged crime occurred, that would be relevant in terms of intent and in terms of absence of mistake."

The only issue concerning intent is whether, at the time of his entry into Catron's rental unit, appellant intended to commit theft. The court instructed the jury that it could consider the prior uncharged acts "for the limited purpose of deciding whether: . . . [appellant] acted with the intent to commit theft in this case; or . . . [appellant's] alleged actions in this case were not the result of mistake or accident."

The Evidence Code does not prohibit "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as . . . intent, . . . [or] absence of mistake . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) "Evidence of uncharged crimes is admissible to prove . . . intent only if the charged and uncharged [acts] are sufficiently similar to support a rational inference of . . . intent. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147 (*Carter*).) "[T]he uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).) "On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion. [Citations.]" (*Carter*, *supra*, at pp. 1147-1148.) We "examin[e] the evidence in the light most favorable to the court's ruling. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 120.)

The issue is forfeited because appellant's counsel did not object on the ground that the prior uncharged acts and the charged offense were not sufficiently similar to support a rational inference of intent. At a pretrial hearing counsel objected that, "[w]ithout hearing from [Bachakes]" as to the nature of the

uncharged acts, "it's premature, in my opinion." Later, immediately before opening statement, counsel stated, "Your honor, I don't think it's relevant if someone was trying to get in her door if she's not able to identify anybody, and I think she made it pretty clear that she's not able to identify anybody in the discovery that I've received." "In accordance with [Evidence Code section 353], [our Supreme Court has] consistently held that the 'defendant's failure to make a timely and specific objection' on the ground asserted on appeal makes that ground not cognizable. [Citations.]" (*People v. Seijas* (2005) 36 Cal.4th 291, 302.)

Even if the issue had been preserved for appellate review, the trial court would not have abused its discretion. Appellant's prior uncharged acts at Bachakes's rental unit are sufficiently similar to the charged offense to support a rational inference that he probably harbored the same intent on both occasions. Each time appellant tried to forcibly enter the locked front door of a residence rented to his mother's tenant. The attempted break-in of Bachakes's rental unit and the break-in of Catron's unit occurred after appellant's mother had been involved in a dispute with the tenants. Bachakes had obtained a restraining order against mother. It is reasonable to infer that, in both instances, appellant intended to steal the tenants' property in retaliation for the trouble they were causing his mother. At a pretrial hearing on the admissibility of Bachakes's testimony, the prosecutor said: "[After Bachakes] told [appellant's] mother, the landlord, that they were having electrical issues and building and safety issues, . . . she began getting intimidated by [appellant], others he was with, and by his mother; . . . [his] mother specifically stated that if [Bachakes] didn't move out she would come into her house and

take all of her things. This statement was made in around November of 2015."

Where, as here, the "evidence of prior conduct is sufficiently similar to the charged crime[] to be relevant to prove the defendant's intent[,] . . . the trial court then must consider whether [under Evidence Code section 352 (section 352)] the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." [Citation]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.) Appellant claims, "It was clear the court did not conduct this analysis." The claim is forfeited because appellant never asked the court to exercise its discretion under section 352. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1130; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 154.)

In any event, the trial court did not abuse its discretion under section 352. "[W]hen ruling on a section 352 motion, a trial court need not expressly weigh prejudice against probative value, or even expressly state it has done so." (*People v. Williams* (1997) 16 Cal.4th 153, 213.) The evidence of the prior attempted break-in had substantial probative value in establishing that appellant acted with the requisite intent when he broke into Catron's rental unit. "The testimony describing [appellant's] uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offense[]. This circumstance decreased the potential for prejudice, because it was unlikely that the jury . . . convicted [appellant] on the strength of [the] testimony . . . regarding the uncharged offense[], or that the jury's passions were inflamed by the evidence of [the] uncharged offense[]." (*Ewoldt*, *supra*, 7 Cal.4th at p. 405.)

Because the prior uncharged acts were admissible to establish appellant's intent when he entered Catron's residence, we need not decide whether the trial court properly admitted the uncharged acts to also establish an absence of mistake by appellant. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 18.)

Trial Court's Allegedly Improper Questioning of Jury During Its Investigation of Claim that a Juror Had Refused to Follow the Instructions

"The court may discharge a juror for good cause (see [Pen. Code,] § 1089), which includes a failure to follow the court's instructions [citation]." (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 69.) "Whether and how to investigate an allegation of juror misconduct falls within the court's discretion. [Citation.] Although a court should exercise caution to avoid threatening the sanctity of jury deliberations, it must hold a hearing when it learns of allegations which, if true, would constitute good cause for a juror's discharge. [Citation.] Failure to do so may be an abuse of discretion. [Citation.]" (*Id.* at pp. 69-70.)

Facts

During jury deliberations, the trial court received the following note from the foreperson: "We are having one of the jurors that is not understanding and won't go by what the law says. We are not sure how to proceed from here. Not able to follow instructions."

The trial court said: "[I]f a juror is not following the law, that is potentially misconduct, but there needs to be some fact-finding as to that and it needs to be done in a very delicate manner so as to not invade the province of the jury and the internal thought processes. [¶] I'm going to bring the jury out, and I'm going to inquire of the foreperson what is the nature of

the [issue] . . . ." "So I'm going to try to clarify from the foreperson what the situation actually is." The court asked appellant's counsel, "Do you wish to be heard as to that . . . ?" Counsel replied, "No, your honor."

In the presence of all of the jurors, the court asked the foreperson about the juror who "is not understanding." The foreperson answered: "[S]he's either not understanding or she is not wanting to understand." She is saying that "[s]he's not going to follow [the law]." "We are all trying to help her, and we're all discussing, but she's basically just sticking to it and saying, 'I'm not moving forward. I'm here, and no one else is going to change my mind about it.'" "[S]he's refusing to follow the law." The foreperson identified juror no. 5 as the person who "is not following the law and the instructions."

The court directed the jurors to return to the jury deliberation room. Out of the presence of the other jurors, it questioned each juror in numerical order, starting with juror no. 1. Juror no. 5 said she accepted that appellant had illegally entered Catron's rental unit, but "I have reasonable doubt because he didn't commit thief [*sic*]." She explained the court's instruction on burglary as follows: "The definition [of burglary] is in two points; first, illegal entry, second, thief [*sic*], if something's stolen." Juror no. 5 said she accepted the instruction. But appellant "didn't commit thief [*sic*], so second part of the definition not filled out."

The court allowed the prosecutor to question juror no. 5. The prosecutor asked her whether "you understand where you're saying that the law is, one, illegal entry, and, two, that he must have committed a theft, correct?" Juror No. 5 replied: "I understand everything. There's nothing I don't understand."

The court interjected, "I don't want you [the prosecutor] to get into an argument." "And I don't want you attempting to persuade anybody of anything." The prosecutor then asked, "Have you reviewed the portions of the instruction for burglary . . . where the law says a theft -- the actual commission of a theft is not required?" The juror responded: "I don't understand. I couldn't understand." "Also, there was a definition of thief [*sic*], also. There was definition of thief [*sic*], and it doesn't pass this. What he did doesn't pass this because he didn't . . . ." The trial court interrupted: "Okay. Okay. I don't want to hear about all that. . . . That's something for -- that's private. All right?" Juror no. 5 was not further questioned.

After the completion of the questioning of juror no. 5, all of the jurors were brought into the courtroom. The court said that, since it was 4:30 p.m., "[w]e have to stop." The court explained that different "options" were available to the jurors. For example, "[i]f you want any additional jury instructions or clarification of jury instructions, I can do that. Many times a jury will request the attorneys to give them additional argument on a certain point that there may be disagreement about. . . . If you think that would help, that can certainly be made available, as well."

The next morning, the court completed its individual questioning of the jurors. The court then questioned the foreperson out of the presence of the other jurors. The foreperson said that, when the jurors met that morning, they asked juror no. 5 if there was "anything else that she would need, you know, after [the court] said yesterday we had those options, and she says she just didn't want to talk about it." The court asked the foreperson if "exercising any of those suggestions would help the

situation?" The foreperson replied, "Yes," and said that the jurors were going to discuss which option they wanted. The court directed the foreperson to return to the jury deliberation room and continue the discussion. Eight minutes later, the jury notified the court that it had reached a verdict.

Appellant Forfeited His Claim that the Trial Court Improperly Questioned the Jury

Appellant claims that the trial court conducted its investigation of juror no. 5 in a "coercive and intrusive manner." "[T]he foreperson could have explained the note in a private discussion with the court so that the court could determine if further investigation was required. Rather, the court put juror number 5 in a very uncomfortable position by forcing her to stand by and listen to the foreperson call her out in front of the entire courtroom and accuse her of not following the law." "[T]he court should have inquired as to what instructions the juror was having difficulty with. At that point, the court should have reinstructed the jury on the elements of burglary and theft and sent them back to the jury room to continue deliberations. Instead, the court immediately launched into an investigation that lasted the remainder of the afternoon and all of the next morning." "[J]uror number 5 was unfairly coerced by the court's aggressive investigation, which resulted in her changing her vote."

Appellant concedes that "defense counsel did not object to the court's procedure." But he argues that, "because the error affected [his] substantial rights to due process and a fair trial, no objection was required in order to raise the issue on appeal." In

support of his argument, appellant cites Penal Code section 1259 without explaining why the section applies.[1]

"[W]e conclude the issue was not preserved for appeal by a timely and specific objection to the trial court's [questioning of the jurors]. [Citation.] Although [appellant] relies on [Penal Code] section 1259 to excuse his failure to object, the argument cannot be sustained. That statute permits a defendant to raise on appeal a claim challenging 'any instruction . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.' [Citation.] [Appellant] is not, however, challenging the correctness of a jury instruction . . . . As is clear, his claim is one of judicial error, not misinstruction of the jury, and that claim is subject to the requirement that a defendant make a timely and specific objection in order to preserve the issue for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1357.)

Appellant Was Not Denied Effective Assistance of Counsel

Appellant contends that counsel's failure to object denied him his constitutional right to effective assistance of counsel. The standard for evaluating a claim of ineffective counsel is set

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[1] Penal Code section 1259 provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. *The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby*." (Italics added.)

forth in *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*): "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Id.* at pp. 687-688.) To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.)

"We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions. [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 703.) Appellant has not overcome this presumption. "We do not agree with [appellant] that the examples of what [he] identifies as inadequate performance are necessarily such or that there could be no plausible . . . justification for [them]. For that reason it is not possible to assess . . . [appellant's] claims on an appellate record which does not reflect the reasons for the actions which [he] now claims fell below constitutional standards of competence. When the record does not shed light on why counsel acted or failed to act in a particular manner, claims of ineffective counsel based on that conduct must be presented by petition for writ of habeas corpus. [Citations.]" (*Id.* at p. 704.)

Appellant maintains that "the court should have reinstructed the jury on the elements of burglary and theft and sent them back to the jury room to continue deliberations." Counsel was not deficient for not requesting that the jury be so

reinstructed. He could have reasonably concluded that it would have been futile to reinstruct the jury. The foreperson did not say that juror no. 5 had not listened to or read the instructions. The foreperson said that juror no. 5 had refused to follow the instructions. Appellant acknowledges, "[I]t was clear juror number 5, along with the other jurors, read the instructions numerous times."

Counsel could also have reasonably concluded that, as a matter of tactics, it was advantageous to his client to initially question the foreperson in the presence of the other jurors. This would allow the other jurors, including juror no. 5, to correct the foreperson's statements if the foreperson misrepresented what had occurred during deliberations. Thereafter, the court individually questioned each juror out of the presence of the other jurors. "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel . . . . Defendant's burden is difficult to carry on direct appeal . . . : '"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' [Citation.]" (*People v. Lucas* (1996) 12 Cal.4th 415, 436-437, brackets in original.)

Appellant faults the trial court for allowing the prosecutor to question juror no. 5. Counsel was not deficient for not objecting to this line of questioning. We recognize that "[t]he very act of questioning deliberating jurors about the content of their deliberations could affect those deliberations. The danger is increased if the attorneys for the parties are permitted to question individual jurors in the midst of deliberations." (*People*

v. Cleveland (2001) 25 Cal.4th 466, 476 (*Cleveland*).) Thus, "permitting the attorneys for the parties to question deliberating jurors is fraught with peril and generally should not be permitted." (*Id*. at p. 485.)

The prosecutor did not question juror no. 5 "about the content of [her] deliberations." (*Cleveland*, *supra*, 25 Cal.4th at p. 476.) The prosecutor asked if she had reviewed the portion of the burglary instruction that "says . . . the actual commission of a theft is not required." The instruction provided: "A burglary was committed if the defendant entered with the intent to commit theft. The defendant does not need to have actually committed theft as long as he entered with the intent to do so. The People do not have to prove that the defendant actually committed theft." Defense counsel could have reasonably concluded that the prosecutor's accurate statement of the law was not properly objectionable. In any event, counsel's failure to object to the prosecutor's question could not have prejudiced appellant. It does not "undermine confidence in the outcome." (*Strickland*, *supra*, 466 U.S. at p. 694.)

Moreover, it is a matter of speculation what led juror no. 5 to change her vote to guilty. "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, the petitioner must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937; accord, *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Motion to Continue the Restitution Hearing

"[Penal Code] [s]ection 1202.4 declares 'the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime.' [Citation.]" (*People v. Runyan* (2012) 54 Cal.4th 849, 856.) The restitution hearing was set for Tuesday, December 19, 2017, before Judge Thomas Rubinson, who had presided at the trial and had sentenced appellant. On the date of the hearing, Judge Rubinson was absent. Judge Gregory A. Dohi appeared in his place. Appellant moved to continue the hearing. His counsel declared, "I think that the proper venue is in front of the sentencing judge, Judge Rubinson. . . . I do think we should be in that courtroom, basically."

The prosecutor opposed the motion. She noted that the victim, Catron, was present and "has been here multiple times for the purposes of restitution." The prosecutor said that the restitution hearing had been calendared "more" than "three times already." Catron was attending school in Cleveland, Ohio. She had flown in for the hearing, which coincided with the school's Christmas break.

Judge Dohi denied the motion. He reasoned, "[I]t is appropriate for a judge other than the judge who heard the trial to conduct the restitution hearing. Judge Rubinson is unavailable for the rest of the week. We are coming up on the holidays." Judge Dohi took into consideration that Catron "has to head back out of state fairly soon." At the close of the hearing, Judge Dohi awarded Catron restitution of $5,917.62.

Appellant recognizes "that, because he was convicted by jury, there is no right that entitles him to have the same judge who presided over the trial impose sentence." (See *People v. Downer* (1962) 57 Cal.2d 800, 816 ["It is settled that it is not error for a judge other than the one who tried a criminal case to pronounce judgment and sentence"].) Nevertheless, appellant contends that the trial court abused its discretion in denying his motion to continue the hearing until Judge Rubinson was available.

"A continuance will be granted for good cause ([Pen. Code,] § 1050, subd. (e)), and the trial court has broad discretion to grant or deny the request. [Citations.] In determining whether a denial was so arbitrary as to [constitute an abuse of discretion], the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 1012-1013, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The trial court did not abuse its discretion. Appellant's only reason for requesting a continuance was that the same judge who had sentenced appellant should preside at the restitution hearing. Appellant failed to explain why a different judge could not fairly conduct the hearing. The court properly took into consideration the inconvenience that a continuance would cause to Catron.

Appellant Is Not Entitled to Have the Case Remanded to the Trial Court to Determine His Ability to Pay Assessments and a Fine

At the time of sentencing, the trial court imposed a $40 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)), a

$30 court facilities assessment (Govt. Code § 70373, subd. (a)(1)), and a $300 restitution fine, the minimum fine for a felony (Pen. Code, § 1202.4, subd. (b)(1)). Based on the recent case of *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), in supplemental briefing appellant argues that we "should strike the [assessments], and vacate the $300 restitution fine and remand for a hearing on [his] ability to pay."

In *Dueñas* the defendant (Dueñas) was convicted of the misdemeanor offense of driving with a suspended license. The trial court imposed the same assessments as here along with a $150 restitution fine, the minimum fine for a misdemeanor. (Pen. Code, § 1202.4, subd. (b)(1).) The total amount due was $220. Dueñas unquestionably was indigent and unable to pay the assessments and fine. She had cerebral palsy and had dropped out of high school because of her illness. Both she and her husband were unemployed. They had two young children. "The family of four receives $350 per month in [CalWorks] cash benefits and $649 per month in CalFresh food stamps benefits. Dueñas uses all the money she receives to take care of the children, but she cannot afford basic necessities for her family. She has no bank account and no credit card. She owns only her clothing and a mobile phone, and her mobile phone service is frequently disconnected because she cannot afford the $40 per month payment. [¶] The family has no home of their own; they alternate between staying at Dueñas's mother's home and the home of her mother-in-law. The electricity was cut off to her mother-in-law's home because the family could not afford to pay the bill." (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160-1161.) "Dueñas receives letters from collection agencies, but she has no way to pay off her debt." (*Id*. at p. 1161.)

Pursuant to Dueñas's request, the trial court set a hearing to determine her ability to pay. "At the . . . ability to pay hearing, the court reviewed Dueñas's uncontested declaration concerning her financial circumstances . . . ." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) The court determined that the assessments "were both mandatory regardless of Dueñas's inability to pay them. With respect to the $150 restitution fine, the court found that Dueñas had not shown the 'compelling and extraordinary reasons' required by statute (Pen. Code, § 1202.4, subd. (c)) to justify waiving this fine. The court rejected Dueñas's constitutional arguments that due process and equal protection required the court to consider her ability to pay these fines and assessments, and ordered her to pay $220 by February 21, 2019." (*Ibid*.) Penal Code section 1202.4, subdivision (c) provides: "A defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution fine. Inability to pay may be considered only in increasing the amount of the restitution fine in excess of the minimum fine . . . ."

The appellate court noted: "The record in this matter illustrates the cascading consequences of imposing fines and assessments that a defendant cannot pay." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1163.) "Imposing unpayable fines on indigent defendants is not only unfair, it serves no rational purpose, fails to further the legislative intent, and may be counterproductive." (*Id*. at p. 1167.)

The court held: "We conclude that due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373. We

also hold that although Penal Code section 1202.4 bars consideration of a defendant's ability to pay unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1164.) The court "reverse[d] the order imposing court facilities and court operations assessments, and . . . remand[ed] the case to the trial court with directions to stay the execution of the restitution fine until the People prove that Dueñas has gained an ability to pay." (*Id.* at p. 1160.)

Dueñas's "holding should be viewed in light of the facts of that case." (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 358, fn. 22; see also *People v. Jennings* (2010) 50 Cal.4th 616, 684 [""The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning""].) In the trial court Dueñas demanded an ability to pay hearing at which she proved that she was in dire economic straits and unable to pay the assessments and restitution fine. The appellate court explained, "Because the only reason Dueñas cannot pay the fine and fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional." (*Dueñas*, *supra*, 30 Cal.App.5th at p. 1160.)

Dueñas is distinguishable. Unlike Dueñas, appellant did not protest that he was unable to pay the assessments and fine. Nor did he request an ability to pay hearing. Nothing in the record suggests that he could not pay the amount due of $370. In contrast to Dueñas, appellant was not homeless. He testified

that he was living with his 54-year-old girlfriend in the unit that had previously been rented to Rachel Bachakes. His mother allowed him to live there rent free. He would "pay her back by doing favors for her," such as "paint[ing] the house," "chang[ing] the lightbulbs," or "[c]leaning the back yard." He was 28 years old and had a high school diploma. There is no evidence that he suffers from a physical or mental disability or that he has children to support. At the time of the offense, he had a working smartphone "and quite clearly could afford the ongoing expense associated with that." (*People v. Johnson* (2019) 35 Cal.App.5th 134, 139.) When the trial court imposed the assessments and fine, it was reasonable to infer that appellant had stolen Catron's missing property and had derived an economic gain from the theft. Dueñas, on the other hand, had not stolen anything.

When appellant was asked if he had been employed in September 2016 when the break-in occurred, he responded: "I wasn't employed. Basically was just helping my mom out around the house to keep my living quarters there." But "'[a]bility to pay does not necessarily require existing employment or cash on hand.' [Citation.] '[I]n determining whether a defendant has the ability to pay a restitution fine, the court is not limited to considering a defendant's *present* ability but may consider a defendant's ability to pay in the future.' [Citation.] This included the defendant's ability to obtain prison wages and to earn money after his release from custody. [Citation.]" (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837.) Appellant was sentenced to prison for two years.

Accordingly, unlike Dueñas, appellant is not entitled to appellate relief from the order requiring him to pay a $40 court operations assessment, a $30 court facilities assessment, and the

minimum $300 restitution fine for a felony conviction. The trial court did not err in not conducting, sua sponte, a hearing on appellant's ability to pay.

Our resolution of this issue is supported by *People v. Frandsen* (2019) 33 Cal.App.5th 1126. The court held that, by failing to object at the time of sentencing to the imposition of a court operations assessment, a court facilities assessment, and a restitution fine, the defendant had forfeited his *Dueñas* challenge to the assessments and fine. (*Id.* at pp. 1153-1154.) The court decided to "stand by the traditional and prudential virtue of requiring parties to raise an issue in the trial court if they would like appellate review of that issue." (*Id.* at p. 1155.)

Disposition

The judgment and victim restitution order are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Thomas Rubinson and Gregory Dohi, Judges

Superior Court County of Los Angeles

Julie Caleca, under appointment by the Court of Appeal for Defendant and Appellant.

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